SUPREME COURT, U. S.
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No. 71-1513

In the Supreme Court of the United States

OCTOBER TERM, 1971

ANTHONY JOSEPH RUSSO, JR., PETITIONER

v.

HON. WM. MATTHEW BYRNE, JR., JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A) was entered without opinion. The oral opinion of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1972. The petition for a writ of certiorari was filed on May 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who had been granted transactional immunity with respect to any testimony he might give before a federal grand jury, can invoke

that immunity to bar the present prosecution if he did not subsequently appear before the grand jury and testify.

2. Whether the extraordinary writ of mandamus is appropriate for the interlocutory review sought at this stage in the proceedings.

STATUTE INVOLVED

Section 2514 of Title 18, United States Code (82 Stat. 216), provides:

> Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination,

> to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

The essential facts are not in dispute. On June 22, 1971, petitioner was served with a subpoena, ordering him to appear the next day and testify before a special federal grand jury in Los Angeles, California, which was investigating possible violations of federal law in connection with the public disclosure of the "Pentagon Papers." Petitioner appeared but declined to answer questions, asserting his privilege against self-incrimination under the Fifth Amendment (Pet. 4).

The government thereupon made application under 18 U.S.C. 2514 to the United States District Court for the Central District of California for an order instructing petitioner, in exchange for a grant of immunity with respect to "any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify * * *", to appear before the grand jury and answer questions. Following a hearing, the application was granted. Petitioner then went before the grand jury a second time, but he again refused to testify. The government moved the district court to hold petitioner in civil contempt under 18 U.S.C. 1826(a)(2),

and, following a hearing on July 2, 1971, it did so. The court of appeals affirmed. See *In re Russo,* 448 F. 2d 369 (C.A. 9), stay of mandate denied *sub nom. Russo* v. *United States,* 404 U.S. 1209. On August 16, 1971, petitioner was committed to custody until the term of the grand jury expired or he agreed to testify, whichever occurred first.

On September 27, 1971, petitioner offered to testify on the conditions that his testimony be transcribed (Pet. 7), that he be provided with a complete written transcript thereof "within 24 hours after each appearance" (Pet. 8), and that he be permitted freely to disclose whatever occurred during his appearance (*ibid.*). Following a hearing on October 1, 1971, the district court essentially accepted petitioner's terms;[1] it ordered that he could purge himself of contempt by appearing on October 18, 1971, and testifying before the grand jury; he was thereupon released from custody.

On the designated date, petitioner appeared outside the grand jury room. He was advised by the government attorney that since the government considered unlawful the district court order requiring production of the grand jury transcript within 36 hours after each appearance,[2] petitioner's appearance would

[1] The court ordered that the grand jury proceedings be recorded, that petitioner be provided a transcript thereof within 36 hours after his appearance, and that petitioner be permitted to show the transcript to others and orally disclose what occurred in the grand jury. There could, however, be "no commercialization of the transcript" (Pet. 9).

[2] On October 5, 1971, the government had served on petitioner a formal "Notice" of its objection to this aspect of the court order (Pet. 10).

be requested only if he agreed to testify without a transcript. Petitioner refused, and the government then moved the district court to vacate its October 1 order requiring immediate disclosure. On November 17, 1971, the court reaffirmed its previous order conditioning petitioner's grand jury testimony upon his receipt of a transcript; it further ruled that, in view of the government decision not to compel the testimony of petitioner under such circumstances, he was deemed to have purged himself of contempt (Pet. App. C).[3]

Thereafter, on December 29, 1971, the grand jury returned an indictment against Daniel Ellsberg and petitioner (Pet. App. D), charging the latter with violating 18 U.S.C. 371, 641, 793(c) and 793(e).[4] On January 14, 1972, petitioner moved in the United States District Court for the Central District of California for a dismissal of the charges against him on the ground that prosecution was barred by the court's earlier grant of transactional immunity under 18 U.S.C. 2514. Judge Byrne denied the motion on January 28, 1972. On May 3, 1972, petitioner applied to the court of appeals for a writ of mandamus directing Judge Byrne to dismiss the indictment. The court

[3] On December 29, 1971, the government filed a notice of appeal from both the October 1 order and the November 17 order (Pet. 12). The question relating to disclosure of the grand jury transcript, however, became unimportant with the government's decision not to compel petitioner to testify before the grand jury; accordingly, the appeal was never perfected.

[4] The indictment superseded an earlier indictment against Daniel Ellsberg, returned on June 25, 1971, which charged Ellsberg with violations of 18 U.S.C. 641 and 793. Petitioner had not been named in the earlier indictment.

of appeals denied such relief without opinion (Pet. App. A).

ARGUMENT

1. Petitioner contends here, as he did below, that the district court's grant of transactional immunity under 18 U.S.C. 2514 bars his subsequent indictment. We disagree.

Following his refusal under the Fifth Amendment to testify before the grand jury, petitioner was granted immunity with respect to "any transaction, matter or thing concerning which he is compelled * * * to testify * * *" (18 U.S.C. 2514). Thereafter, he persisted in his refusal to answer questions and was adjudged in civil contempt. After spending a little over one month in jail, he offered to testify on the condition, *inter alia*, that he promptly be provided a transcript of his appearance. When the district court ordered such disclosure, however, the government objected on the ground that the 36-hour limit within which to furnish petitioner with his transcript copy was unlawful.[5] It determined not to seek petitioner's grand jury testimony on such a condition.[6]

[5] Rule 6(e), Fed. R. Crim. P., permits a court to direct disclosure of a grand jury transcript only "preliminary to or in connection with a judicial proceeding * * *." At the time that the court entered its order, petitioner was not involved in any judicial proceeding. Indeed, the present indictment was not returned against him until December 29, 1971, more than two months later. See *Doe* v. *Rosenberry*, 255 F. 2d 118, 120 (C.A. 2).

[6] Petitioner was held to have "purged himself of [civil] contempt by his promise to testify before the grand jury conditioned upon being furnished a written transcript of his testimony within thirty-six hours of his appearance" (Pet. App. C, p. 73).

Consequently, petitioner gave no testimony before the grand jury. He is, therefore, now in no position to invoke the statutory immunity of 18 U.S.C. 2514. As the district court correctly observed (Pet. App. B, p. 54), "the language of that section * * * provides that the immunity attaches at the time that the testimony is given and * * * the scope of the immunity is determined by the testimony that is given." And see *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79–80; *In re Grand Jury Investigation of Giancana*, 352 F. 2d 921, 925 (C.A. 7), certiorari denied, 382 U.S. 959.

Petitioner's position seems to be that he is entitled to protection from prosecution because "the failure of the witness to testify was attributable not to him but to the government" (Pet. 37). He does not seriously dispute that, had the present indictment been returned earlier, while he was in jail for civil contempt, the district court's grant of Section 2514 immunity would have afforded him no protection (Pet. 37). Rather, he contends (Pet. 36) that, given his "willingness to testify upon the condition already approved by the District Court and given that his not testifying was attributable solely to the government's refusal to comply with that condition, [he] is entitled to be treated, for purposes of determining transactional immunity, as if he had testified."

The immunity statute, however, while it requires that the United States Attorney filing an application thereunder first make a judgment that the witness' testimony "is necessary to the public interest," does not prohibit the government, once the immunity appli-

cation receives court approval, from thereafter declining for appropriate reasons to compel such testimony. "An immunity statute * * * creates a framework in which the prosecuting attorney can make a calm and reasoned decision whether to compel testimony and suffer the resulting ban on prosecution, or to forego the testimony." *Kastigar* v. *United States,* No. 70–117, decided May 22, 1972, slip op. 5 (Mr. Justice Marshall, dissenting).

Here, the government decided to forego questioning petitioner before the grand jury, but not, as petitioner intimates (Pet. 27), because of a change of mind about the public importance of his testimony.[7] Rather the decision was based on a considered judgment that the transcript-disclosure requirement subsequently imposed by the district court as a condition to compelling petitioner's testimony was unlawful (see n. 5 *supra*). Whether or not that legal conclusion is correct, the validity of the condition is sufficiently questionable under Rule 6(e), Fed.R.Crim.P., that the government cannot be faulted for declining to take petitioner's grand jury testimony in the face of the 36-hour disclosure requirement. There is thus no cause for treating petitioner for present purposes as if he had testified.[8]

[7] Whether this would have been a permissible ground for not taking petitioner's testimony once he had been given transactional immunity is not presented in this case.

[8] We cannot agree with petitioner that the government's refusal to insist on his testimony violated the district court's order for transcription and disclosure. As we have already pointed out, that order merely imposed upon the government certain conditions if it compelled petitioner to testify (Pet. 8–10). By electing not to do so, however, the government was not obliged

2. At all events, the district court's interlocutory order denying petitioner's motion to dismiss the present indictment does not warrant resort to the extraordinary writ of mandamus. As this Court reaffirmed not too long ago in *Will* v. *United States,* 389 U.S. 90, 95, quoting *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26, mandamus jurisdiction "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" Thus "it is clear," the Court observed (389 U.S. at 95), "that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

The present dismissal order is concededly not an action by the district court that it was powerless to take. The claim here is simply that the court "erred in ruling on matters within [its] jurisdiction." *Parr* v. *United States,* 351 U.S. 513, 520. Thus, even assuming *arguendo* that the district court so erred—which we dispute—there is no cause here for issuance of the extraordinary writ of mandamus. See, *e.g., Will* v. *United States, supra; Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379; and compare *United States* v. *Dooling,* 406 F. 2d 192, 198 (C.A. 2), certiorari denied, 395 U.S. 911.

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under the court order to meet those conditions. Moreover, since the district court specifically held (Pet. App. C) that petitioner, by indicating a willingness to testify if he were promptly provided a transcript, had purged himself of contempt, he has not been in any way prejudiced by the government's ultimate decision.

Moreover, as pointed out in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110, "the writ [of mandamus] is not to be used as a substitute for appeal * * * even though hardship may result from delay and perhaps unnecessary trial * * *." It is undisputed that the interlocutory dismissal order involved here can "be reviewed by appeal after entry of a final judgment" (Pet. 45). "All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in narrowly defined circumstances, until after final judgment has been rendered by the trial court." *Will* v. *United States, supra*, 389 U.S. at 96. There are, we submit, no exceptional circumstances presented in this petition to warrant a departure from that general policy of deferral.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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